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In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE JUDICIAL EDUCATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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INTEREST OF *AMICUS CURIAE*[1]

The Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited powers, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions involving the consideration of race in public university admissions have stressed the importance of transparency in order that strict judicial scrutiny may be applied. A court cannot evaluate "the means chosen to accomplish the [government's] asserted purpose," *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2420 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)) ("*Fisher I*"), unless those means are actually disclosed to the court.

That simple point bears emphasizing in light of the facts that remained undisclosed here. Despite the extraordinary attention paid to the consideration of race in admissions by the University of Texas at Austin ("UT") through this litigation,

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[1] Rule 37 statement: All parties lodged with the Clerk blanket consents to the filing of *amicus* briefs. Further, no part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

the school managed for years to maintain a secret, parallel admissions process run out of the Office of the University President. An independent investigation only recently revealed that, in a significant percentage of cases, the separate process considered race and ethnicity as a factor in forcing the admission of applicants who were not admitted through the publicly known process.

UT's "official" race-conscious admissions process cannot withstand strict scrutiny for the reasons already shown by Petitioner. Its underground process demonstrates the extent to which university administrators are willing to flout this Court's decisions demanding transparency—and to keep their State's citizens in the dark about how the University's admissions process *actually* "works in practice." *Fisher I*, 133 S. Ct. at 2421.

ARGUMENT

I. Because Strict Scrutiny Requires The University To Demonstrate How Its Race-Conscious Admissions "Process Works In Practice," The Actual Process Must Be Transparent.

In *Fisher I*, the Court emphasized that rigorous application of strict scrutiny is required to ensure constitutional accountability. This means the University bears a heavy evidentiary burden to demonstrate that its consideration of race is both permissible and necessary: It must "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'" *Fisher I*, 133 S. Ct. at 2418 (quoting *Regents of the Univ. of Cal.*

v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.)).

Under *Fisher I* and *Grutter*, universities considering race in admissions must maintain transparent admissions policies in order to show how those policies treat individual applicants. "[I]t remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that *each applicant is evaluated as an individual* and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Fisher I*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 337) (emphasis added). "The importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Grutter*, 539 U.S. at 337.

Transparency is thus essential to ensure that universities do not attempt to do in the dark what they cannot constitutionally accomplish openly. "Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Fisher I*, 133 S. Ct. at 2421.

This Court's Justices have observed that vague affirmative action standards pose a risk that that universities will obscure their consideration of race in admissions. *Grutter*, 539 U.S. at 394 (2003) (Kennedy, J., dissenting) ("If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admis-

sions schemes transparent and protective of individual review."); *Gratz v. Bollinger*, 539 U.S. 244, 297-98 (2003) (Souter, J., dissenting) (admissions policy suffered from the "serious disadvantage" of "deliberate obfuscation," and concluding that "[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball."); *Bakke*, 438 U.S. at 405 (Blackmun, J., concurring) ("The cynical, of course, may say that under a ["plus factor"] program such as Harvard's one may accomplish covertly what Davis concedes it does openly.").

Indeed, some Justices have argued that the Court should embrace broad, race-conscious admissions programs because university admissions officers simply cannot restrain themselves from considering race, even if the school's stated policy bars it. *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting) ("institutions of higher education may resort to camouflage" if they cannot explicitly consider race); *id.* at 305 ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.").[2]

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[2] Some Justices have likewise exposed the dangers of vague race-conscious standards in the course of arguing that open and express racial balancing is the preferable course. *See Bakke*, 438 U.S. at 379 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("[T]here is no basis for preferring a particular preference program simply because in achieving the same goals [as a quota system], it proceeds in a manner that is not immediately apparent to the public.").

But *Fisher I* confirmed that the Court's continued tolerance for racial preferences is not a license for universities to push their affirmative action policies into the shadows. Strict judicial scrutiny is the bulwark against such covert subversion of equal protection. *Fisher I*, 133 S. Ct. at 2421. "Prospective students, the courts, and the public can demand that the State and its . . . schools prove their process is fair and constitutional in every phase of implementation." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

The spectacle of UT's secret admissions process, however, presents a problem far worse than merely using vague standards. The very act of evaluating "how the [admissions] process works in practice," *Fisher I*, 133 S. Ct. at 2421, is only *possible* if all of the race-conscious processes themselves are *actually disclosed* to the litigating parties and the court. Here they were not.

II. The University Maintained A Secret, Race-Conscious Admissions Process.

UT considered race and ethnicity in undergraduate admissions through a secret process that evaded public scrutiny until a former admissions officer blew the whistle in 2014. An independent investigation revealed that UT's "holistic review" process was regularly overridden through application "holds" placed at the request of the University's President—a separate admissions process that UT shielded from the public, the petitioner, and the courts presiding over this litigation. *See generally* Kroll Inc., *University of Texas at Austin – Investigation of Admissions Practices*

and Allegations of Undue Influence, Feb. 6, 2015 ("Kroll Report").[3]

A. Despite Suspicions Of Improper Political Favoritism, UT's Secret Process Evaded Scrutiny For Years.

The Kroll Report is the culmination of a three-year investigation into whether Texas State legislators exerted undue influence over UT's admissions process. University of Texas Regent Wallace Hall first raised questions about whether the University granted favoritism to politically connected families in 2012. These questions were not well received. Hall was censured, threatened with impeachment, and became the target of a legislative investigation. Opinion, *Texas Admissions Rumble*, Wall St. J., Feb. 12 2015, online at http://www.wsj.com/articles/texas-admissions-rumble-1423772596.

In response to Hall's inquiry, the University eventually requested that its general counsel and its Vice Chancellor for Student Affairs conduct an investigation. In May 2014 they issued an "Admissions Inquiry Report" concluding that legislators used letters of recommendation to influence the admissions process, but proposed closing the book on the issue without further investigation. University of Texas System, *U.T. Austin Admissions Inquiry* 2-3, 12-14 (May 2014).[4]

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[3] Online at https://www.utsystem.edu/sites/utsfiles/news/assets/kroll-investigation-admissions-practices.pdf.

[4] Online at https://www.utsystem.edu/sites/utsfiles/documents/inquiry/ut-austin-admissions-inquiry/admissions-report-final.pdf.

In June 2014, however, a former UT admissions official alleged that UT's Office of the President had "exerted pressure on the Office of Admissions . . . to admit some applicants of lesser qualifications in response to external influences." Kroll Report at 4. In response to these new allegations, the University of Texas Chancellor and the Board of Regents retained Kroll Inc. to conduct an independent investigation into UT's admissions process. *Id.*

B. The Kroll Report Revealed A Separate Admissions Track In Which UT's President Trumped Decisions By The Admissions Office.

The Kroll Report described how "the [secret] process work[ed] in practice." *Fischer I*, 133 S. Ct. at 2421. The University would receive letters of inquiry or recommendation in support of applicants from "'a friend of the university' or other 'person of influence"—whether it be a public official, a member of the University's Board of Regents, an "important alumnus or alumna," or a major donor. *Id.* at 12-13.

In response to these letters, the President's Office would put a "hold" on the application, which "prevent[ed] a negative [admissions] decision from becoming final until the President's Office . . . [was] first notified." *Id.* at 41. Decisions for those applicants on the "hold" list who were not admitted through the regular process were made at the end of the admissions cycle during meetings between the Director of Admissions and the President's Office.

It was through these end-of-cycle meetings that the President's Office could override the standard admissions process and direct admissions decisions. In a number of occasions, the President made his own "holistic determinations that differed from that of the Admissions Office" resulting in certain applicants being "admitted over the objection of the Admissions Office." *Id.* at 13, 28-29; *see also id.* at 39-40 (detailing the pressure placed on the Admissions Office by the President's Office).

The actual justifications for these admission decisions are now literally impossible to track: the UT officials involved in the secret meetings kept few records and shredded those that did exist. The Kroll Report explains:

> Efforts were made to minimize paper trails and written lists during this end-of-cycle process. At one meeting, the administrative assistants tried not keeping any notes, but this proved difficult, so they took notes and later shredded them.

Kroll Report at 43. Likewise:

> Because written records or notes of meetings and discussions between the President's Office and Admissions are not maintained and are typically shredded, it is not known in particular cases why some applicants with sub-par academic credentials were placed on a hold list and eventually admitted.

Id. at 13.

For his part, then-UT President Bill Powers claimed he "only intervened or interfered with the admissions process . . . when he believed it advanced the cause of the university." *Id.* at 42. Such interference was justified because, in his view, "the Admissions Office does not always see the larger picture and benefits to the University of admitting certain applicants due to 'relational factors' and the importance of those relationships to the university community." *Id.* at 43. And while the President's Office maintained that his actions did not violate any laws or established university policies, even his assistant conceded that "there [was] otherwise 'no real defense of this issue.'" *Id.* at 42.

Of the 1,140 in-state applicants over the six-year period whose applications were subject to presidential "holds" and who did not qualify for automatic admission under the Top Ten Percent Plan, 842 were admitted to the University—for an admissions rate of 72 percent. *Id.* at 58. By comparison, from 2009-2013, the admissions rate for all in-state applicants undergoing "holistic review" was 15.79 percent. University of Texas System, *U.T. Austin Admissions Inquiry* (May 2014), Att. C (Feb. 7, 2014 Memorandum of Kendra Ishop, Vice Provost and Director of Admissions), at 16.[5]

Kowtowing to affluent citizens may be unseemly and scandalous, particularly at a pubic

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[5] Online at https://www.utsystem.edu/sites/utsfiles/documents/inquiry/ut-austin-admissions-inquiry/admissions-report-attachments.pdf.

university, but it is not constitutionally suspect.[6] Until Kroll released its report in February 2015, the public and the Petitioner had no way of knowing that UT also considered race in this separate and secret admissions track, a practice that does raise constitutional concerns.

C. The Secret Process Considered Race And Ethnicity In A Significant Percentage Of Cases.

While the Kroll investigation was focused on the concern that political connections overrode the public admissions process, the investigation revealed that the secret process augmented the "official" consideration of race and ethnicity: many students admitted through the system benefitted from racial preferences.

Investigators reviewed a small sample of 73 admissions files corresponding to applicants who were admitted "despite grades and test scores substantially below the median for admitted students." Kroll Report at 60.[7] The Kroll Report con-

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[6] President Powers remained unbowed through entire process, and he remains firmly committed to the righteousness of this "relationship"-focused approach. *See* Ry Rivard, *In Texas, Questioning Powers*, Inside Higher Ed, Feb. 13, 2015, available at http://bit.ly/1J7ONXe; Bill Powers, *Report issued on UT Austin admissions*, Feb. 12, 2015, online at http://towertalk.utexas.edu/2015/02/12/report-issued-on-ut-austin-admissions/.

[7] The 73 files represent applicants who were admitted despite having both a grade point average below 2.9 and a combined SAT score less than 1100 and—values that fell at least one standard deviation below the mean (3.34 and 1282), based on a six-year average of applicants who were admitted to and enrolled at the University. Kroll Report at

firmed that, in fact, the secret process did result in favoritism towards politically connected families. In a few cases, strong ties to Texas legislators appeared to provide the only basis for admission; in most cases, a combination of legislative influence and other factors supported the admissions decision. *Id.* at 61-62. And while state law prohibits legacy preferences, many applicants emphasized family connections to the University. *See id.* at 62 (noting one alumnus' plea that "[t]his is my last hope to get a Longhorn grandson").

The Report concluded that UT's secret process was not limited to advancing cronyism, however. For this small subset of substantially-below-mean academic application files:

> In approximately 29%, or 21 of the 73 files reviewed, the contents of the files suggest that ethnic, racial, and state geographical diversity may have been an important consideration. *In very few of these files were there any indication of political or other connections with persons of influence.*

Id. at 62 (emphasis added).

54-60. The total number of students admitted through Presidential holds despite having a comparatively low GPA and SAT scores is significantly higher. *See id.* at 59 (Table 5, plotting GPA and SAT scores of Presidential hold admittees); Jon Cassidy, *UT admissions scandal is 10 times bigger than official report*, Watchdog.org, July 14, 2015, online at http://watchdog.org/228880/kroll-powers-breathtaking/ (noting that "[a]t least 764 applicants initially denied admission to the University of Texas were admitted" through the hold program).

Another cohort of students in this small sample benefited from *both* "relationship" factors and racial or ethnic factors:

> In eleven other cases where legislative influence was apparent, there were multiple factors that may have contributed to the decision to admit, including political and alumni connections, ethnic and racial diversity, a high [Personal Achievement Index], or slightly more borderline grades and test scores. For this group, GPAs ranged from 1.8 to 2.7 and combined SAT scores ranged from 940 to 1100. Several of these applicants were proficient in Spanish or other foreign languages, and some came from lower socio-economic backgrounds.

Id.

Wrapping up its findings as to the sample group, the Kroll Report described the consideration of race in the secret process as if it were a partial exoneration:

> In sum, Kroll's review of the 73 application files, in which applicants subject to a Q or B hold[8] were admitted despite sub-par quantitative scores and grades, suggested that, in some instances, factors such as political influence or connections with persons of influence may have played a role . . . . In many other cases, there was *no evi-*

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[8] UT used letter designations to track applicants. "Q" designates a hold placed by the President's Office; a "B" means the hold was requested by both the President's Office and one of UT's deans. Kroll Report at 7.

> *dence of political or other connections* with persons of influence. *Many cases demonstrated the nature of holistic review, as well as a demonstrated commitment to ethnic and racial diversity.*

Id. at 62 (emphasis added). Similarly, in the Report's summary of findings, Kroll observed that "several" of the academic "outlier" admission decisions "suggested a demonstrated commitment to ethnic and racial diversity and the consideration of other *appropriate criteria*." *Id.* at 13-14 (emphasis added).

As *Fisher I* emphasized, however, it is the judiciary's "obligation" to ensure that the University's consideration of race is appropriate. *See Fisher I*, 133 S. Ct. at 2420; *see also id.* at 2421 ("simple assurances of good intention" do not suffice to justify racial classifications) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)).

D. The Secret Process Was A Perfect Vehicle For UT To Engineer The Type Of "Diversity" It Wanted.

The precise extent to which race factored into the decisions for admittees who benefited from the secret process remains a mystery. The sample group of 73 academic "outliers" discussed above was just that: a small sample. Nevertheless, given the relatively small number of students to benefit from the "official" consideration of race through the holistic review process, *see* Petioner's Brief at 9-10, the Kroll Report shows that the secret process significantly augmented the official process.

UT's statements about how it thinks affirmative action should work only bolster that conclu-

sion. President Powers unapologetically favored the continued consideration of race in admissions after *Fisher I*. Bill Powers, *Why Schools Still Need Affirmative Action*, National L.J., Aug. 4, 2014. For example, Powers argued race-conscious admissions were appropriate because "[t]he share of U.T. Austin students who are Hispanic or African-American is still vastly smaller than that of the population at large." *Id.* But he didn't stop at racial balancing; Powers also claimed that considering race was justified to improve the university's reputation: "U.T.'s reputation as a basically white school still hampers recruiting of minority students, including those who would be admitted in a race-blind process." *Id.* Powers concluded with unabashed enthusiasm for racial discrimination in admissions decisions: "Opponents accuse defenders of race-conscious admissions of being in favor of 'social engineering,' to which I believe we should reply, 'Guilty as charged.'"[9] *Id.*

Given his outspoken advocacy for the consideration of race in ways flatly contrary to the Court's teachings,[10] it is inconceivable that Presi-

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[9] While Powers may be well-intentioned, "[h]istory should teach greater humility," *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting), because "[r]acial discrimination is never benign," *Fisher I*, 133 S. Ct. at 2430 (Thomas, J., dissenting). *See id.* at 2429-32 (Thomas, J., dissenting). Put simply, "racial engineering does in fact have insidious consequences." *Id.* at 2431.

[10] For instance, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). *See also Grutter*, 539 U.S. at 330 (noting that "racial balancing" is "patently unconstitutional").

dent Powers didn't consider race as a significant factor when he thought the secret process would never see the light of day.

Likewise, as the *Fisher I* litigation unfolded, it became clear that the University hoped to engineer its racial makeup by adding "diversity" from wealthy neighborhoods—precisely the type of well-connected applicant families benefiting from the secret process. *See* Br. for Respondents at 34, *Fisher I*, 133 S. Ct. 2411 (No. 11-345) (arguing that UT needs to consider race because "[t]he African-American or Hispanic child of successful professionals in Dallas" "could help dispel stereotypical assumptions . . . by increasing diversity within diversity").[11]

In sum, the secret process provided UT the perfect opportunity to achieve these stated (and impermissible) goals through the back door. The *ad hoc* process was subject to no rules, guidelines, or oversight. Even if the secret process had been disclosed in the litigation, it would have been impossible to determine whether "each applicant was evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter*, 539 U.S. at 337.

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[11] UT advanced this "diversity within diversity" theory on remand when arguing that its consideration of race helps it to achieve a "critical mass" of underrepresented minority students. *See Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 669-71 (5th Cir. 2014) (Garza, J., dissenting) (discussing UT's "qualitative" diversity-within-diversity objective).

President Powers resigned under pressure from the Chancellor, and left the University in June 2015.[12] Yet the risk of continued back-door consideration of race in admissions has not been eliminated.

The University of Texas System recently approved a new admissions policy that formally allows university presidents to continue admitting students separate from the admissions office:

> Since it is ultimately the responsibility of the president to operate in the best interest of the institution, he or she may, on very rare occasions, have cause to admit a qualified student who might not otherwise be admitted through the normal process. It is the policy of the U.T. System that such admissions decisions be very rare . . . [and] be defensible decisions that take into consideration the overall best interests of the institution . . . .

University of Texas System, *U.T. System Proposed Admissions Policy for Academic Institutions* 9 (Aug. 20, 2015).[13] In announcing the approval of the new policy, UT assured that "Presidents and admissions officers at the University of Texas System's academic institutions will *now* have a

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[12] Holly K. Hacker, *UT President Powers told to resign or be fired, sources say*, Dallas Morning News, July 4, 2014; Nathan Koppel, *University of Texas at Austin President Bill Powers Resigns*, Wall St. J., July 9, 2014.

[13] Online at https://www.utsystem.edu/sites/utsfiles/news/assets/admissions-policy-academic-2015-08-20.pdf.

clear set of system-wide guidelines and processes to follow when making undergraduate admissions decisions." University of Texas System, *UT System Board of Regents Approve Admissions Policy for Academic Institutions*, Aug. 20, 2015 (emphasis added).[14]

CONCLUSION

For these reasons, and those stated by Petitioner, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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[14] Online at https://www.utsystem.edu/news/2015/08/20/ut-system-board-regents-approve-admissions-policy-academic-institutions. The new policy still does not prohibit consideration of race or ethnicity in such "very rare" cases.